

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHUCK JOHNSON,

Plaintiff,

v.

JOSEPH LEHMAN,

Defendant.

Case No. C04-5877RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
DECEMBER 16<sup>th</sup>, 2005**

This 42 U.S.C. § 1983 civil rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. On May 23<sup>rd</sup>, 2005 the court denied plaintiff's motion to have the United States Marshals serve this action for the plaintiff. Plaintiff is not proceeding *in forma pauperis*. (Dkt. # 8). That order specifically informed plaintiff he had 120 days to serve the action.

On October 5<sup>th</sup>, 2005 the court entered an order to show cause as it did not appear the action had been served and there has been no activity in the case. (Dkt. # 9). There was no response to the order to show cause.

DISCUSSION

Federal Rule of Civil Procedure 4 (m) states that if service of a summons and complaint is not made within 120 days of filing the court shall dismiss without prejudice unless the plaintiff can show good cause why service was not made within that time. Ignorance of the rules is not good cause. Townsel v. County of Contra Costa, 820 F.2d 319, 320 (9th Cir.1987). The above analysis and a plain reading of the rule would appear to suggest that dismissal without prejudice is in order. However, the standard of review is

1 abuse of discretion which indicates the Court has discretion in deciding if dismissal is proper. Wei v. State  
 2 of Hawaii, 763 F.2d 370, 371 (9th Cir. 1985).

3 The 9th Circuit has stated that failure to comply with the service requirements does not mandate  
 4 dismissal and the rule should be given liberal and flexible construction as long as the defendant receives  
 5 sufficient notice of the complaint. United Food & Commercial Workers Union v. Alpha Beta Co., 736  
 6 F.2d 1371, 1382 (9th Cir. 1984). Failure to follow technical requirements does not warrant dismissal  
 7 where “(a) the party that had to be served personally received actual notice, (b) the defendants would  
 8 suffer no prejudice from the defect in service, (c) there is a justifiable excuse for failure to serve properly,  
 9 and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.” Borzeka v. Heckler,  
 10 739 F.2d 444, 447 (9th Cir. 1984).

11 There is no indication that the named defendant is aware of this action being filed. Plaintiff’s failure  
 12 to effect service after having been warned by the court is inexcusable. Accordingly, the case should be  
 13 **DISMISSED WITHOUT PREJUDICE**.

#### 14 CONCLUSION

15 Plaintiff’s failure to respond to an Order to Show Cause and his failure to serve the  
 16 defendants, has resulted in more than 120 days passing without service on the named defendant.  
 17 Accordingly, this action be should be **DISMISSED WITHOUT PREJUDICE**. A proposed Order  
 18 accompanies this Report and Recommendation.

19 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the parties  
 20 shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6.  
 21 Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474  
 22 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter  
 23 for consideration on **December 16<sup>th</sup>, 2005**, as noted in the caption.

24 DATED this 23<sup>rd</sup> day of November, 2004.

26 

27 Karen L. Strombom  
 28 United States Magistrate Judge